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No. 88-1399

In The

Supreme Court of the United States

October Term, 1988

PEABODY COAL COMPANY,
a Delaware corporation,

Petitioner,

vs.

STATE OF ARIZONA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
State Of Arizona, Division One

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Respondents accept the questions presented by the Petitioner.

LIST OF PARTIES AND RULE 28.1 LIST

The Respondents accept the list of parties and Rule 28.1 list set forth by the Petitioner.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondents, State of Arizona and Arizona Department of Revenue, respectfully respond in opposition to the Petitioner's petition for a writ of certiorari.

OPINION BELOW

The opinion of the Arizona Court of Appeals, Division One, is reported at 158 Ariz. 190, 761 P.2d 1094

(1988). The decision of the Supreme Court of Arizona denying the Petitioner's petition for review (October 18, 1988) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

REASONS FOR DENYING THE WRIT

ARGUMENT I

PEABODY'S CLAIM THAT ARIZONA HAS NO POWER TO IMPOSE A TRANSACTION PRIVILEGE TAX ON ITS ACTIVITIES ON AN INDIAN RESERVATION IS FRIVOLOUS

A long line of established precedents upholds the exercise of state sovereignty over non-Indians who undertake activity on Indian reservations. *See, e.g., California State Bd. of Equalization v. Chemehuevi Indian Tribe,* 474 U.S. 9 (1985); *Montana v. United States,* 450 U.S. 544 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976); *McClanahan v. State Tax Commission,* 411 U.S. 164, 168 (1973); *Surplus Trading Co. v. Cook,* 281 U.S. 647 (1930); *Thomas v. Gay,* 169 U.S. 264 (1898); *Utah & Northern Ry. Co. v. Fisher,* 116 U.S. 28 (1885).

Peabody's reliance on this Court's statement in *Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S.

832, 844 (1982), that "New Mexico has not explained the source of its power to levy such a tax on this case where the 'privilege of doing business' on an Indian reservation is exclusively bestowed by the Federal Government" is misplaced.

Putting it into context, the quoted language was only used by this Court in questioning New Mexico's argument relating to the benefits it conferred upon the non-Indian contractor. The quoted language appeared after the following:

> [W]e fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands* pursuant to a contract between the tribal organization and the non-Indian contracting firm. *Id.* at 844 (emphasis in original).

The quoted language, therefore, is at best a rhetorical question posed by the Court in response to New Mexico's argument. The language was not the basis for this Court's decision in *Ramah.*

Plainly, the *Ramah* decision was not premised on New Mexico's lack of power to impose a gross receipts tax upon a non-Indian entity. As this Court acknowledged, 458 U.S. at 837:

> Although there is no definitive formula for resolving the question whether a State may exercise its authority over tribal members or reservation activities, we have recently identified the relevant federal, tribal and state interests to be considered in determining *whether a particular exercise of state authority violates federal law. Id.* at 837 (emphasis added).

The above-quoted language clearly calls for a preemption analysis.

Moreover, in *Ramah* this Court specifically rejected the suggestion of the Solicitor General that a new test, based on the dormant Indian Commerce Clause, be adopted. Instead, this Court found that "the existing *pre-emption analysis* governing these cases is sufficiently sensitive to many of the concerns expressed by the Solicitor General." *Id.* at 846 (emphasis added). It is, therefore, abundantly clear that the *Ramah* decision rests on the preemption analysis and not on New Mexico's lack of power to impose its gross receipts tax.

Finally, Peabody urges (Peabody Petition, p. 9) that the " . . . right to do business by mining coal on the Navajo and Hopi Indian Reservations is granted to Peabody by virtue of its lease with the Indians. The lease exists pursuant to the authority of the federal government." The Respondents have no general quarrel with this contention. If, as in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), Arizona were attempting to tax a transaction between a non-Indian mining company and an Indian tribe – thereby *reducing* tribal royalties – Peabody's argument would be correct.

However, since the tax herein impacts only the transactions between Peabody and its non-Indian customers on and off Indian reservations, under separate coal sale and purchase agreements – and results in an *enhancement*, rather than an erosion of tribal revenues – Peabody's "privilege" argument is incorrect.

ARGUMENT II

ARIZONA'S TRANSACTION PRIVILEGE TAX IS NOT PREEMPTED BY FEDERAL LAW

Peabody parades a litany of federal coal mining laws and regulations in its petition and argues that these laws preempt the state tax in question. Peabody admits, however, that the state tax does not impose any economic burden upon the tribes. That admission takes this case out of the application of the preemption doctrine.

As this Court in *Ramah* explained:

> We found [in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980)] the federal regulatory scheme for harvesting Indian timber to be so pervasive that it precluded the imposition of additional burdens by the relevant state taxes. . . . [T]he state taxes in question would "threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . .' " *Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. at 838-839 (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 149-150 (1980)).

Next, the *Ramah* preemption test requires an examination and consideration of the relevant federal, tribal and state interests. In examining these relevant interests in *Ramah,* this Court concluded that New Mexico's "general desire to increase revenues" was "insufficient to justify" the State's intrusion into an area so heavily regulated by the federal government. *Id.* at 845.

However, the Arizona tax here does not intrude at all into an area regulated by the federal government. It does not impose a tax on Peabody's lease contracts with the

Indian tribes. It is not levied on the construction of Peabody's facilities on tribal land. It does not impact on mining extraction or production of coal.[1] Rather, it is imposed on transactions between the non-Indian seller, Peabody, and other non-Indian buyers. The only connection with the Indian reservations is that the coal is produced there and that tribal royalty payments are thereby enhanced. These facts take this matter totally out of the *Ramah* case.

To begin with, as Peabody concedes,[2] and unlike the case here, the New Mexico taxes in *Ramah* were imposed upon a business transaction between a non-Indian contractor and an Indian tribal school board. Additionally, as Peabody further concedes, the economic burden of the New Mexico tax was passed on to the tribe in *Ramah*, whereas here, there is no direct burden on the Navajo or Hopi Tribes as a result of the imposition upon and collection of the Arizona taxes from Peabody. Not only does the tax herein have no direct (or even indirect) burdensome or deleterious impact on the tribes, the tax positively benefits the tribes through extensive on-reservation expenditures by the State of Arizona for social, medical and educational purposes.

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[1] In this respect, Arizona's tax is significantly different from the severance and oil and gas emergency school taxes levied by New Mexico on oil production on an Indian reservation. *Cotton Petroleum v. New Mexico*, 106 N.M. 517, 745 P.2d 1170 (App. 1987) *prob. juris. noted*, ___ U.S. ___, 108 S. Ct. 1466 (1988).

[2] *See* Peabody Petition at 7, n.1.

In this regard, and as successfully advocated by both the Navajo and Hopi Tribes in *In re Peabody Coal*, 83 IBLA 248 (1983), the economic burden of these taxes constitutes nothing more than one of Peabody's ordinary costs of doing business. As such, it serves as a positive component of the gross proceeds upon which Peabody calculates the royalties it pays to the tribes under its coal leases.

In the present case, the Arizona taxes are imposed upon Peabody, which in turn "passes on" their economic burden to its non-Indian, off-reservation power utility customers. Significantly, the primary impact of the taxes on the Navajo and Hopi Tribes is to provide large sums of money for state aid to education payments made by Arizona to Indian reservation school districts. For fiscal years 1980-1981 to 1984-1985, Arizona expended state general fund revenues of nearly $120 million for school districts located wholly on the Navajo and Hopi Indian Reservations. It also provided nearly $215 million (more than five times the amount of tax then paid by Peabody under protest) to support school districts partially on and partially off these reservations. *See* opinion below, 761 P.2d 1094, 1098; Peabody Petition, p. 7a.

The secondary impact is to substantially enhance the royalty payments received by the Navajo and Hopi Tribes as a result of their inclusion in the gross proceeds base

upon which Peabody must calculate its royalty payments to the tribes under its coal leases.[3]

The Arizona tax supplies tens of millions of dollars of state (as opposed to federal) aid to the education of Navajo and Hopi children. Many of those children matured and were employed by Peabody at the reservation coal mines. Moreover, Peabody's Arizona Division headquarters, which constitute the "nerve-center" for its coal mining operations in the state, are located in Flagstaff, Arizona, completely beyond the boundaries of any Indian reservation. There, Peabody receives the full spectrum of state and local services and protections. Under these circumstances, *Ramah* simply does not apply.

Arizona's tax is virtually indistinguishable from the cigarette excise tax imposed by states on sales of cigarettes by Indian smokeshops to non-Indians. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). Indeed, these cases apply with even greater force here because the seller is a non-Indian and not an Indian.

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[3] *See In re Peabody Coal*, 83 IBLA 248 (1983). *Cf.*, 30 C.F.R. Part 206, § 206.251 (defining 'gross proceeds' for coal royalty payment purposes as including tax reimbursements accruing to a lessee ". . . even though the Federal or Indian royalty interest may be exempt from taxation.") and § 206.257(b)(5) (recognizing that the value of coal for royalty calculation purposes under Indian coal leases must include, rather than exclude, state taxes of the nature here in question). These regulations became effective March 1, 1989. *See* 54 Fed. Reg. 1492, 1525 (1989).

ARGUMENT III

PEABODY LACKS STANDING TO ARGUE THAT THE STATE TAX INTERFERES WITH TRIBAL SOVEREIGNTY AND IN ANY EVENT TRIBAL SOVEREIGNTY IS NOT INFRINGED

In an appeal from the state court to this Court, the case or controversy requirement of Art. III, Sec. 2 of the Constitution applies:

> But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

Doremus v. Board of Education, 342 U.S. 429, 434 (1952). Peabody, a non-Indian corporation, cannot complain that the state tax infringes on tribal sovereignty:

> [T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights of third parties.

Warth v. Seldin, 422 U.S. 490, 499 (1975) (citing *Tileston v. Ullman*, 318 U.S. 44 (1943); *United States v. Raines*, 362 U.S. 17 (1960); and *Barrows v. Jackson*, 346 U.S. 249 (1953)); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

Moreover, the doctrine of *jus tertii*[4] is unavailing to Peabody. The Navajo Tribe and the Hopi Tribe, whose tribal sovereignty is invoked by Peabody, are perfectly capable of themselves invoking their tribal sovereignty by intervening in the action below, appearing as amici

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[4] *See Barrows v. Jackson*, 346 U.S. 249 (1953)

curiae below, or appearing as amici curiae in this proceeding.[5] The reason for their failure to do so is obvious – their tribal sovereignty is not affected by the state tax. Instead, their economic well-being is enhanced by the state tax. As the Arizona Court of Appeals noted in the proceeding below:

> We next note that rather than these taxes being a burden upon the Indian tribes involved, the taxes enhance their revenues. Because of Peabody's contracts with the power consortiums, the taxes involved here are recovered by Peabody and are included in Peabody's gross realization figure for royalty calculation purposes. In fact, both tribes argued successfully before the Interior Board of Land Appeals of the United States Department of the Interior that these taxes should be included as part of Peabody's gross realization. I.B.L.A. 83-248 (April 29, 1983). Therefore, imposition of these taxes actually furthers the federal and tribal interests by increasing the royalties paid to both tribes. 761 P.2d 1094, 1100 (1988).

Finally, the fact that the Arizona Court of Appeals found that Peabody had standing to raise the issue of tribal sovereignty is not binding on this Court. There is no case or controversy requirement as far as Arizona courts are concerned. *State v. B Bar Enterprises, Inc.* 133 Ariz. 99, 649 P.2d 978 (1982). Moreover, neither *Ramah* nor *White Mountain* mandates that the standing requirement be ignored when a tribal sovereignty issue is raised in conjunction with a federal preemption argument. In

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[5] "Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights." *McGowan v. Maryland*, 366 U.S. 420, 430 (1961).

Ramah, the plaintiff Ramah Navajo School Board was a "tribal organization within the meaning of 25 U.S.C. § 450b(c), 88 Stat. 2204." 458 U.S. at 832. In *White Mountain*, the tribe itself was a party. Accordingly, standing was not an issue in either case.

Therefore, this Court's discussion in *Ramah* as to the "two independent but related barriers to the exercise of state authority over commercial activity on an Indian reservation," 458 U.S. at 832, must be viewed in the context of resolving claims made by Indian entities. Nothing in either *Ramah* or *White Mountain* remotely suggests that the Article III, Sec. 2 "case or controversy" limitation or this Court's prudential limitations on standing must be ignored whenever a preemption claim is made by a non-Indian.[6]

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[6] Peabody has no interest in upholding tribal sovereignty other than its economic interest in paying less taxes. That economic interest is not sufficient to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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